

**PROFESSIONAL SECURITY
CONSULTANTS, INC.**

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I. STATEMENT OF THE CASE

Professional Security Consultants, Inc. (the “Company”) submits this brief in support of its exceptions (“Exceptions”) to the Report on Objection of Hearing Officer Tracy Belfiore (the “Hearing Officer”) in the above-captioned case issued on March 13, 2015 (the “Report”). The Hearing Officer failed to make critical findings of fact and credibility resolutions based upon the record. As a result, the Hearing Officer’s recommendations that the Company’s objection be overruled and a Certificate of Representative be issued are unsupported by the record, and are therefore, contrary to law.

The evidence in the record clearly demonstrates that, since February 16, 2013, Wilfredo Tirado (“Tirado”) was a statutory supervisor under Section 2(11) of the National Labor Relations Act (the “Act”). Tirado supervised six to ten employees assigned to the Company’s “graveyard” shift which worked between 11:00 p.m. and 7:00 a.m. During these hours, Tirado was the only supervisory employee managing the Company’s operations at the Bush Terminal property. The evidence in the record also clearly demonstrates that Tirado improperly engaged in union organizing activities as a supervisor and stated that employees who did not sign union authorization cards would be terminated. Despite this evidence, the Hearing Officer failed to properly consider and acknowledge Tirado’s status as a supervisor at the time he engaged in union organizing activity, and assess the effect of Tirado’s status and activity upon employees in the proposed bargaining unit.

Specifically, the Hearing Officer failed to recognize the heightened effect of Tirado’s pro-union statements on employees under his supervision given the his role as the only supervisory employee with whom graveyard shift employees interacted while working for the Company. Additionally, approximately three months before Security Alliance of Federated

Employees Union, Local 642 (the “Union”) filed its petition, Tirado began identifying himself as a non-supervisory security officer in a log book and to other employees, despite the fact that he continued to perform supervisory duties and the Company had not demoted him. The only reasonable conclusion with respect to Tirado’s actions is that he attempted to disguise or renounce his supervisor status in order to engage in union organizing activity without consequence while still exercising supervisory authority on behalf of the Company. Based on Tirado’s admitted deception, the Hearing Officer should have discredited Tirado’s testimony denying pro-union activities and recognized record evidence demonstrating such activities.

Furthermore, the Hearing Officer improperly discredited the testimony of witness Montaj Kahn (“Kahn”) who provided detailed evidence of Tirado’s coercive and pro-union activities and the effect such activities had on the subsequent election. Kahn, whose testimony was complicated by demonstrated difficulties with the English language, repeatedly clarified his testimony, and clearly and credibly testified that Tirado told him that all Company employees who failed to sign a Union authorization card would be terminated. However, the Hearing Officer ignored the obvious communication difficulties and repeated clarifications on this point, and used Kahn’s language difficulties to discredit his consistent testimony. Due to the inherently incredible nature of Tirado’s contrary testimony, and the Kahn’s repeated clarifications in light of the communication difficulties, the Hearing Officer improperly credited Tirado’s testimony over that of Kahn and, by so doing, grossly mischaracterized the record and reached an erroneous conclusion.

On these and other grounds, as discussed in more detail herein, the Company contends the Hearing Officer’s Recommendations set forth in the Report are unsupported by the record

and are therefore contrary to law. Accordingly, the results of the December 16, 2014 election should be set aside and a new election should be held.

II. RELEVANT FACTS

A. The Company.

The Company is a provider of security guard services at its client's Bush Terminal facility, which consists of approximately 16 buildings in Brooklyn, New York ("Bush Terminal"). (Transcript at 15-16).¹ The Company employs approximately 30 employees at Bush Terminal, including the director, assistant director, supervisors, and security officers. (Tr. 16). The Company provides security services at Bush Terminal 24-hours a day, seven days a week. (Tr. 17). Employees are assigned to shifts, which consist of three standard shifts and one "vertical patrol" shift. (Tr. 17). The standard shifts consist of a first shift from 7 a.m. to 3 p.m., a second shift from 3 p.m. to 11 p.m., and a graveyard shift from 11 p.m. to 7 a.m. (Tr. 17). The "vertical patrol" shift is a 10-hour shift from 8 p.m. to 6 a.m., and therefore, straddles the second and graveyard shifts. (Tr. 17). The "vertical patrol" shift does not have an independent supervisor, but rather is supervised by the supervisor of the concurrent standard shifts. (Tr. 34). Each standard shift has approximately six employees assigned while the vertical patrol shift has approximately four employees assigned. (Tr. 17, 33).

B. Bush Terminal Supervisors.

The Company provides its supervisors with "Post Orders" setting forth their specific duties, supervisor training, and a supervisor manual that outlines the Company's expectations and the supervisors' responsibilities. (Tr. 19-21; Employer Exhibits 1-3).² Supervisors' responsibilities include ensuring policies and procedures are followed by security officers,

¹ For purposes of citation, "transcript" will be abbreviated as "Tr."

² For purposes of citation, "Employer Exhibits" will be abbreviated "Emp. Ex."

overseeing deployment of security officers, directing security officers in the event of an emergency, disciplining security officers, calling off-duty security officers into work, recommending overtime when needed, making hiring recommendations, and maintaining shift strength. (Tr. 21-23, 132).

Under the Company's process for demoting employees, including supervisors, an employee first receives a written warning. (Tr. 294). After the third offense, a request for demotion is filled out and submitted in the Company's online human resources system. (Tr. 294). That request goes from the Regional Director to the Company's corporate office, to be reviewed by the Human Resources Department and the Vice President of Operations, who makes the final decision regarding the requested demotion. (Tr. 294). Only the Vice President of Operations is authorized to make a final decision concerning a supervisor's demotion. (Tr. 294).

C. Supervisor Wilfredo Tirado.

On February 16, 2013, the Company promoted Tirado from the position of security officer to supervisor. (Tr. 26; Emp. Ex. 4). The Company's Vice President of Operations, Gal Yaniv ("Yaniv"), approved Tirado's promotion. (Tr. 294). At the time of his promotion, Tirado received a pay raise and, On December 7, 2013, received an additional, periodic pay raise as a supervisor. (Tr. 27; Emp. Ex. 4). Tirado completed supervisor training on August 6, 2013. (Tr. 28; Emp. Ex. 5).

Since his promotion, Tirado has worked as a supervisor primarily on the graveyard shift. (Tr. 28). Like all Company supervisors, Tirado's duties included enforcing policies, prioritizing and organizing responses to calls, deploying employees, and disciplining employees. (Tr. 28, 40-41, 52-53). As the graveyard shift overlapped with the "vertical patrol" shift, Tirado also had responsibility for overseeing both the security officers assigned to the graveyard shift and the

“vertical patrol” security officers during the overlapping portion of their shifts. (Tr. 31-32-). Tirado supervised between six and ten employees. (Tr. 17, 33).

In March 2014, Tirado sent text messages to then-Director of Security Donald DeArmon (“DeArmon”) stating he (Tirado) had heard rumors he was being demoted and replaced as a supervisor. (Tr. 29; Emp. Ex. 6). DeArmon responded that Tirado was not being demoted from the supervisor position and, if that were to happen, DeArmon would speak directly with Tirado. (Tr. 30; Emp. Ex. 6). At no time relevant to this matter did DeArmon notify Tirado that he had been or was being considered for demotion. (Tr. 30). Moreover, DeArmon never submitted a request to demote Tirado, and, in fact, Tirado was never demoted. (Tr. 294).

In mid-May, 2014, Tirado was involved in an accident while operating a Company vehicle during working time, and pursuant to Company policy and requirements of the Company’s insurance policy, lost his driving privileges while at work. (Tr. 49). However, the Company did not discipline Tirado or demote him from the position of supervisor. (Tr. 50). Yaniv testified that Tirado was an effective and skilled supervisor and the Company wanted to keep him in a supervisory position regardless of his loss of driving privileges. (Tr. 296).

As a result of Tirado’s loss of driving privileges, the Company posted him at Building 10, which (at the time) was where Bush Terminal’s property management was located and where alarms for Bush Terminal’s security systems are located. (Tr. 51). At this time, DeArmon spoke with Tirado and explained that Tirado was still a supervisor and was in charge of the graveyard shift. (Tr. 51). Tirado agreed that that DeArmon never told him that he was no longer a supervisor. (Tr. 218). Tirado also acknowledged that the Company employs other supervisors who do not have driving privileges, and that he performed supervisor duties after his loss of driving privileges. (Tr. 213, 214, 217, 221).

While posted at Building 10, Tirado continued to perform supervisor duties that security officers (including those also posted at Building 10) could not perform. These duties included disciplining employees, assigning employees, changing employees' assignments, authorizing call-ins or shift changes, and enforcing policies and procedures. (Tr. 53-54).

On August 11, 2014, Tirado unilaterally and without DeArmon's direction, started signing off on his entries in the Building 10 log book as a "security officer" instead of "supervisor." (Tr. 111, 238).³ Even though Tirado unilaterally decided to identify himself as a security officer, the evidence demonstrates that Tirado had not been demoted from the supervisor position and was not relieved of his supervisory duties. (Tr. 115-16). Tirado never approached DeArmon to request that he be removed or demoted from the supervisor position. (Tr. 116). Moreover, Yaniv did not approve a demotion for Tirado, which would have been necessary to change Tirado's status, nor was Tirado's pay reduced below the level of a supervisor. (Tr. 116, 294).

D. Tirado's Union Organizing Activities.

During the second week November 2014, Tirado called then-security officer Kahn, directed him to come to the Building 10 desk, handed him a union authorization card, and asked Kahn to sign it. (Tr. 136-38, 141, 148). Tirado told Kahn that all the employees at Bush Terminal would be fired if they did not sign union authorization cards. (Tr. 138, 139, 150-51, 166, 169, 174). Kahn signed the card because he was afraid that he would "get fired" if he did not do so. (Tr. 138). Although Tirado was not Kahn's direct supervisor, Kahn recognized Tirado's supervisory authority and testified that Tirado would regularly give Kahn direction as a supervisor. (Tr. 144-46). After signing the union authorization card, Kahn handed it back to Tirado. (Tr. 140).

³ On November 19, 2014, Supervisor Tirado resumed signing off as a supervisor in the log book. (Tr. 212).

When Tirado solicited Kahn to sign the union card, he also directed Kahn to ask then-security officer Henk Asmus (“Asmus”) to also sign a union authorization card. (Tr. 137). Kahn followed Tirado’s directive and asked Asmus to sign the card. (Tr. 137, 151). In response, Asmus stated that he did not want or trust a union. (Tr. 137, 151).

On the same day that Tirado solicited Kahn to sign the union authorization card and told him that failure to do so would result in termination, he also told Kahn to attend an organizing meeting with the Union approximately four days later at a restaurant near 4th Avenue and 33rd Street in Brooklyn. (Tr. 140-41, 149). Tirado also told Kahn that the Union was “good.” (Tr. 167).⁴ At Tirado’s direction, Kahn went to the Union organizing meeting and stayed for approximately 20 minutes. (Tr. 140). Kahn testified that Tirado was at the Union meeting and was sitting with a Union representative and three other employees. (Tr. 143, 146-47). Kahn also saw approximately four other Company employees when he was at the meeting. (Tr. 143). Tirado admitted that he signed a union authorization card and attended a Union organizing meeting held by the Union, although he claims the meeting was held at a McDonalds. (Tr. 222).

E. The December 16, 2014 Election.

The Union filed its petition on November 4, 2014. On November 20, 2014, the parties signed a Stipulated Election Agreement and entered into a separate written stipulation stating that “Wilfredo Tirado [is a] supervisor . . . as defined under Section 2(11) of the National Labor Relations Act, inasmuch as [he has] authority, in the interest of [the Company], to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, discipline employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, in a manner that requires use of independent judgment.” (Report at p. 7).

⁴ The Hearing Officer recognized that Tirado did not deny telling Kahn that the Union is good and credited Khan’s testimony on this point. (Report at p. 13).

An election was held by secret ballot on December 16, 2014 for a bargaining unit comprised of full-time and regular part-time security guards employed at Bush Terminal, excluding certain employees including the director of security, assistant director of security, and supervisors as defined by the Act. There were 25 ballots cast, two of which were challenged; of the remaining 23 ballots, 18 were cast for the Union and 5 were cast against the Union.

F. The Company's Objections.

On December 23, 2014, the Company filed a timely objection based upon Tirado's conduct affecting the election. On January 13, 2015, the Company submitted a position statement and evidence in support of its objection, requesting, at a minimum, that the December 16 election results be set aside and a new election ordered.

On January 23, 2015, Regional Director James Paulsen issued his Report on Objections and Notice of Hearing.

A hearing was held before the Hearing Officer on February 3, 2015 in Brooklyn, New York. The Company presented four witnesses: DeArmon, Kahn, Asmus, and Yaniv. The Union presented three witnesses: Tirado, security officer Robert Stevens, and security officer Darwin Dominguez.

On March 13, 2015 the Hearing Officer issued the Report, to which the Company now submits its Exceptions.

III. ARGUMENT

A. The Hearing Officer Failed to Finally Determine Tirado's Supervisory Status and to Properly Take Account of Tirado's Supervisory Status and the Impact his Status and Actions Had Upon the Employees Under His Supervision.

The evidence in the record clearly supports the conclusion that, since Tirado's promotion on February 16, 2013 and thereafter, including prior to and during the election process, he was a

statutory supervisor under the Act. The Hearing Officer, however, failed to appreciate the impact of Tirado's status upon the bargaining unit, particularly with respect to the six to ten employees under his direct supervision.

In the Report, the Hearing Officer stated:

[T]he credible record evidence indicates that Tirado was not formally demoted inasmuch as 1) after the accident, Director DeArmon told Tirado that he was still a supervisor, that he was still in charge of his shift and never told him otherwise (Tr. 51-52, 204-205, 218); 2) there was no formal request to demote Tirado through the Employer's online Human Resources system; 3) the Vice President of Operations did not approve a demotion of Tirado, which would be required for such action (Tr. 293-294); 4) Tirado's wage rate never decreased (Tr. 216); and, 5) Tirado admits that he never received written notification that he was demoted (Tr. 215). While Tirado testified that he stopped performing supervisory duties, DeArmon testified that he did not eliminate Tirado's responsibility for supervisory duties. (Tr. 115-116).

(Report at p. 6)(footnotes omitted). The Hearing Officer also acknowledged that "the parties stipulated that Wilfredo Tirado held the position of supervisor on November 7, 2014." (Report at p. 8).

Aside from Tirado's inherently incredible testimony (discussed below), all of the evidence in the record supports a finding that Tirado was a supervisor during the relevant time period. However, the Hearing Officer failed to appreciate the impact of this status upon the bargaining unit employees, particularly in light of Tirado's attempt to disguise his supervisor status, his admission that he signed a union authorization card, his admission that he attended a Union organizing meeting, his union organizing activity with respect to Kahn and Asmus, and the fact that Tirado directly supervised between six and ten of the 27 employees in the proposed bargaining unit during this period of time.

By failing to determine whether Tirado was in fact a statutory supervisor during the entire relevant period, the Hearing Officer avoided making a critical determination regarding the impact of Tirado's status and actions upon the employees under his supervision. Tirado directly

supervised between six and ten employees during the graveyard shift, which is an amount sufficient to change the election results. Moreover, between the hours of 11:00 p.m. and 7:00 a.m., Tirado was the only Company supervisor at Bush Terminal and the only supervisor who had regular contact with graveyard shift employees. As a result, in light of the evidence demonstrating that Tirado engaged in pro-union and coercive activity, its effect is multiplied by the unique nature of his supervisory status with regard to these ten employees. Thus, the Hearing Officer's Report is inadequate as it fails to make all necessary determinations, and the Hearing Officer's recommendations should not be implemented.

B. The Hearing Officer Failed to Discredit Tirado's Inherently Incredible Testimony Denying Union Organizing Activity and Coercive Conduct in Support of the Union.

Tirado's testimony is inherently incredible in light of the fact that he unilaterally demoted himself and self-servingly attempted to document that he was not a supervisor. Despite this undisputed evidence, the Hearing Officer credited much of Tirado's testimony when the only reasonable conclusion is that Tirado deceitfully attempted to disguise his supervisory status in order to engage in union organizing activity without consequence.

In March 2014, Tirado mentioned rumors that he was being demoted to DeArmon and DeArmon quickly informed Tirado that such was not the case. Moreover, DeArmon specifically told Tirado that if he were to be demoted, DeArmon would speak with him directly prior to doing so. At the time that Tirado claims he was demoted in August 2014, DeArmon never told Tirado that he was being demoted or altered his work duties. Indeed, DeArmon testified that, during the entire period relevant to this matter, Tirado was the sole supervisor for the graveyard shift and was expected to fully perform all supervisory duties.

Moreover, Yaniv never approved a demotion for Tirado, which is a required step in the Company's demotion procedure. Tirado never received a reduction in pay following his

supervisory pay raise. Tirado acknowledged that he performed supervisory duties after the loss of his driving privileges and that not all of the Company's supervisors have driving privileges. Furthermore, Kahn and Asmus both recognized Tirado as a supervisor, even after his loss of driving privileges. (Tr. 144, 179-80).

Contrary to all the evidence that Tirado was never demoted, Tirado claims that Assistant Director John Serrantino verbally demoted him, after which point he began signing off on the Building 10 log book as a security officer. (Tr. 207). Tirado's testimony conflicts with all other indications of his status at that time and simply is not supported by the facts.

The record supports the finding that Tirado attempted to create documentation of his demotion when, in fact, no such demotion had occurred. The only reasonable conclusion as to why Tirado would do so, especially in light of his admissions that he signed a Union card and attended a Union meeting, is that Tirado engaged in Union organizing activities and concocted his "demotion" to avoid any consequences for doing so while a supervisor. Tirado's deceptive and self-serving actions cast doubt upon all of his testimony. Therefore, the Hearing Officer improperly credited Tirado's inherently incredible testimony.

C. The Hearing Officer Improperly Discredited the Testimony of Montaj Kahn.

The Hearing Officer improperly discredited the majority of Kahn's testimony regarding Tirado's Union organizing activity. As discussed above, Tirado's testimony is inherently incredible, and as such, Kahn's testimony deserves more weight. Furthermore, in making credibility determinations, the Hearing Officer seized upon alleged inconsistencies in Khan's testimony despite his repeated and consistent clarifications as to his testimony. Kahn clearly was having trouble communicating as the result of difficulties with the English language. Unfortunately, the Hearing Officer relied on these language difficulties to manufacture

inconsistencies in Kahn's testimony and, on that basis, discredited Kahn's very clear testimony regarding Tirado's coercive Union organizing activities.

In her credibility resolutions, the Hearing Officer stated:

I specifically do not credit Kahn's testimony that Supervisor Tirado asked him to sign a Union Card or that Tirado threatened him in connection thereto and I credit Tirado's denials of such conduct. Similarly, I do not credit Khan's testimony that Tirado told him to ask Asmus to sign a card. Further, I specifically do not credit Khan's testimony that Supervisor Tirado told Khan to go to a Union meeting or that he saw Tirado at a Union meeting at a Spanish restaurant that served liquor.

...

I specifically do not credit Khan's testimony that Tirado told him if he did not sign a card he would be fired or everyone would be fired.

Further, Khan's testimony that Tirado told him to attend a Union meeting and that he attended a Union meeting at a Spanish restaurant where Tirado was also in attendance does not inspire confidence and I do not find it credible.

(Report at pp. 13-14)(footnotes omitted).

In making her credibility determinations, the Hearing Officer emphasized purported inconsistencies in Kahn's testimony, regarding whether Tirado's threat was directed at all Bush Terminal employees or only at Kahn. (Report at pp. 9 n.11, 14). In his testimony, Kahn clarified on six separate instances that Tirado threatened that not signing a Union authorization card would result in termination to all of the Company's Bush Terminal employees. (Tr. 139, 150, 151, 166, 169, 174).

During the hearing, the Hearing Officer, the Union's attorney, and the Company's attorney each noted their difficulties understanding Kahn's testimony. (Tr. 138, 141, 145, 150, 154). As such, due to the communication difficulties, the clarified inconsistencies in Kahn's testimony should be considered in light of his repeated attempts to clarify his testimony. It would be unfair, and contrary to the NLRB's policy, to discredit a witness' testimony due to difficulties testifying in English. See, e.g., Solar International Shipping Agency, 327 NLRB 369 (1998)(where foreign language witnesses are required for the hearing, the Board secures the

interpreter and pays the costs).

Despite clear evidence of Tirado's deceptive and self-serving actions, voiced support for the union, admitted signing of a union card, and attendance at a Union organizing meeting, the Hearing Officer accepted Tirado's version of events and discredited Kahn's. Given the dubious nature of Tirado's testimony, and the improper discrediting of Kahn's testimony in light of his communication difficulties, the Hearing Officer's credibility determinations are not supported by the record. As the Hearing Officer based her recommendations upon these faulty credibility determinations, they should not be implemented.

IV. CONCLUSION

Through the entire period relevant to this matter, Tirado exercised responsibilities as a statutory supervisor over a minimum of six and a maximum of ten employees - enough to affect the outcome of the election. Tirado admitted to signing a union card, attended a Union organization meeting, and voiced his support in favor of the Union. In an act that can only be viewed as an attempt to "cover his tracks" while engaging in union organizing and coercive activity, Tirado took steps to document an alleged demotion that is otherwise completely unsupported by the evidence. As such, Tirado's testimony, in which he denied engaging in pro-union activity and denied being a supervisor during a key three-month period just prior to the election, is inherently incredible and did not deserve the weight afforded to in the Hearing Officer's report.

In addition the Hearing Officer improperly discredited Kahn's testimony regarding Tirado's union organizing and coercive activities and relied on Kahn's difficulties in communicating to reach credibility determinations regarding his testimony. In all, the Hearing Officer failed to determine Tirado's status as a supervisor during the entire relevant period and

the effect of his status and actions upon his subordinates, improperly credited Tirado's inherently incredible testimony, and discredited the credible testimony of Kahn.

For the reasons set forth in the Company's Exceptions, the Hearing Officer's factual conclusions and credibility resolutions are without support in the record, and therefore, the Regional Director should: (1) reject the Hearing Officer's recommendation to overrule the Company's objection; (2) reject the Hearing Officer's recommendation that a Certification of Representative be issued; (3) set aside the December 16, 2014 election; and (4) order that a new election be held.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2015 the foregoing was filed electronically via the E-Filing system on the NLRB website. The foregoing was also served via certified U.S. Mail and email on Stephen Goldblatt, counsel for the Petitioner, Local 642, Security Alliance of Federated Employees, 3315 Nostrand Avenue, Ste L1-A, Brooklyn, NY 11229-3269 (goldblattlegal@gmail.com).

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